No. 83-775

IN THE
Supreme Court of the United States

October Term, 1983

FRANCES GWENDOLYN GUSTINE,

Petitioner,

vs.

GLENN LANK GUSTINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA

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QUESTION PRESENTED

Does California Civil Code § 5110, as interpreted by the California Supreme Court, violate the Contract Clause of the United States Constitution when applied to an event (contract/deed) predating its interpreted application?

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INTRODUCTION

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division One, entered on May 25, 1983. A timely petition for hearing in the California Supreme Court was denied on July 20, 1983.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. I, § 10, cl. 1 "No State shall . . . pass any . . . law impairing the obligation of Contracts. . . ."

California Civil Code § 5110, See Appendix B, attached hereto.

28 U.S.C. § 2403(b), See Appendix C, attached hereto.

PARTIES TO THE PROCEEDING BELOW

All parties appear in the caption of the case. 28 U.S.C. § 2403(b) may apply.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is printed in Appendix A; said opinion was not certified for publication in the official reports.

JURISDICTION

The judgment of the Court of Appeal, printed in Appendix A attached hereto, was entered on May 25, 1983. A timely petition for a hearing in the California Supreme Court was denied on July 20, 1983. The judgment of the Court of Appeal, entered on May 25, 1983, became final on July 25, 1983 (California Rules of Court, Rule 25).

STATEMENT OF THE CASE

A) Factual Summary

The parties hereto married on July 12, 1967, and separated on October 1, 1979. Prior to the date of the marriage and on June 21, 1967, Petitioner and Appellaant FRANCES GWENDOLYN GUSTINE purchased certain real property commonly described as 1312 San Pablo Court, Lake San Marcos, California [R.T. 11:18-21]. FRANCES GWENDOLYN purchased said real property with a down payment of Fourteen Thousand Five Hundred Dollars ($14,500.00) borrowed from her mother and Ten Thousand Dollars ($10,000.00) from her own funds [R.T. 11:26-12:7]. Title to said residence was taken in Petitioner's name only at the time of acquisition.

Three years later, *i.e.*, June 4, 1970, title to the real property located at 1312 San Pablo Court, Lake San Marcos, California, was placed in the names of FRANCES GWENDOLYN GUSTINE and GLENN LANK GUSTINE, as joint tenants [R.T. 16:28-17:4].

At the time of discussing and executing the contract/deed dated June 4, 1970, Respondent husband did not expect Appellant wife to make a gift of one-half of her interest in the property to husband [R.T. 20:15-19].

At the time of the June 4, 1970, contract/deed, husband understood that the reason and purpose of the deed was so that husband and wife would appear as a team to the world, to the public, and would appear to everyone *other than husband and wife*, that husband and wife owned the property as a team [R.T. 21:3-7].

At the time of the June 4, 1970, contract/deed husband understood that said contract/deed would not deprive wife of her separate property interest in the property [R.T. 21:8-14].

B) How Federal Question Is Presented

At the trial level the instant Petitioner requested that the property be characterized as a joint tenancy, not community property [C.T. 54:16-20]. This request, in essence, was a plea that the trial court

recognize the sanctity of the contract/deed which explicitly stated the property was held in joint tenancy.

Petitioner further requested the trial court to recognize the property as Petitioner's separate property [C.T. 54:28, 55:2], an essential basis for the formation of this particular contract/deed.

The trial court refused Petitioner's requests, finding the property held in joint tenancy was the community property of Petitioner and Respondent [C.T. 66:4-5]. The trial court based its decision on California Civil Code § 5110, stating the Petitioner failed to overcome the presumption of California Civil Code § 5110 [C.T. 66:6-8].

Petitioner subsequently appealed the trial court's decision to the California Court of Appeals, Fourth District. There the Petitioner again argued that the intentions of the contracting parties (Petitioner and Respondent), together with the contract/deed, should control and not be interfered with by California Civl Code § 5110 as interpreted by the California Supreme Court [Appellant's Brief, pp. 5-7]. Petitioner further argued that any presumptions created by § 5110 were successfully rebutted by the express contract/deed and the express intentions of the parties [Appellant's Brief, pp. 11-12]. The Court of Appeals held that even though an injustice was created by recognizing the real property at issue as community property, the Court was obligated to do so because of a California Supreme Court case that mandated that particular finding [Appeals Court Decision 4 Civil No. 26768, p. 6, attached hereto].

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner concedes the Contract Clause of the U.S. Constitution is not absolute, nor are all impairments of contracts improper. *Morseburg v. Balyon* (1980) 621 F.2d 972, 979. However, the Contract Clause is a viable limitation on a State's power, as the power of a State to regulate contracts between private parties is limited. *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 17.

In *U.S. Trust Co. v. New Jersey, supra*, this Court held a State was not "free to impose a drastic impairment (of contract) when an evident and more moderate course would serve its purposes equally well." 431 U.S. at 31. While the Court in *U.S. Trust Co.* was referring, in that particular instance, to a contract between a State itself and a private company, the

underlying rationable applies equally to contracts between two private individuals. Contracts allow "individuals to order their personal and business affairs according to their particular needs and interest." *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 245.

While a "presumption (exists) favoring 'legislative judgment as to the necessity and reasonableness of a particular measure' ", *Allied Structural Steel Co., supra*, at 247 (quoting *U.S. Trust Co.*), the instant Petitioner respectfully submits that the judicial interpretation of California Civil Code § 5110, as held in *In re Marriage of Lucas* (1980) 27 Cal.3d 808, oversteps the legislative intent and violates the Contract Clause.

The *Lucas* case, interpreting § 5110, requires a family residence held in joint tenancy during marriage to be characterized as community property, unless a showing of express agreement or understanding to the contrary is demonstrated. 27 Cal.3d at 815.

Prior to *Lucas* a "tracing" to one party's separate property was sufficient to overcome any presumption of community property created by § 5110. *In re Marriage of Aufmuth* (1979) 89 Cal.App.3d 458, 465 (1st Dist.). This allowed the State to preserve its interest in the protection of each spouse's financial interest in a marriage, while at the same time allowing the contractual intentions of each spouse to be respected. That is, if the intentions of each spouse were to hold a residence as a joint tenancy but retain the separate property characteristic it previously possessed, tracing to the initial source was a sufficient means of balancing § 5110 and the State's interest with the rights of the contracting parties.

Lucas however expands the presumption of § 5110 beyond the need of the State to protect its citizens. This was recognized by the California Legislature in Assembly Bill No. 26, Chapter 342, 1983-84 Regular Session, which rejects the *Lucas* rule and allows tracing to rebut the community property presumption.

The California legislature enactment of California Civil Code § 5110, as applied by the California judiciary per *In re Marriage of Lucas, supra*, retrospectively disrupts the personal and business relationship between Petitioner and Respondent with utter disregard for the contractual intentions of the parties and with dire disdain for the particular needs and interests of the parties that the contract/deed was designed, *ab initio*, to accomplish.

The California legislature has recently recognized the inherent inequities flowing from the strict application of the *Lucas* interpretation of California Civil Code § 5110 and, by enacting California Civil Code § 4800.1 (effective January 1, 1984) and by amending California Civil Code § 5110 (effective January 1, 1984), has provided a dispositive means of fairly determining the respective interests of married persons in joint tenancy property. In so doing the California Legislature has rejected the *Lucas* holding and has adopted a more moderate course of impairing the contractual relations between married persons. This less drastic and more reasonable approach should be applied to the instant case. Alternatively, the law prevailing at the time of the contract/deed ought dictate the effect thereof.

CONCLUSION

In light of the foregoing this Honorable Court is respectfully requested to grant a writ of certiorari.

DATED: November 8, 1983

Respectfully submitted,

RAMON D. ASEDO

Counsel for Petitioner

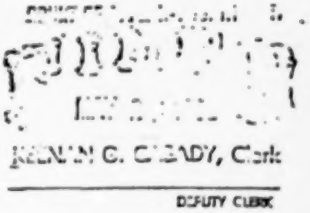
APPENDICES

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA



n re the Marriage of rances Gwendolyn and lenn Lank Gustine	
RANCES GWENDOLYN GUSTINE, Appellant, v. LENN LANK GUSTINE, Respondent.	4 Civ. No. 26768 (Super. Ct. No. DN 22883)

APPEAL from a judgment of the Superior Court of San Diego Coun-, Anthony C. Joseph, Judge. Affirmed.

FACTS

On June 21, 1967, Frances Gustine purchased a home in San Marcos ith a down payment of $14,500 borrowed from her mother and $10,000 rom her own funds. A $10,000 promissory note secured by a deed of rust on the property was given for the balance of the purchase price. She ook title in her name alone. About three weeks later, she married Glenn ustine. From the time of their marriage until their separation in Oc-ober 1979, they used the San Marcos home as the family residence.

On June 4, 1970, at her husband's insistence Ms. Gustine conveyed the an Marcos home to herself and Mr. Gustine, husband and wife, as joint enants. No extensive discussions occurred before changing the title.

Neither husband nor wife thought a gift was being made. One of the objectives behind the change was so that the husband and wife would appear as a team to the world.

The trial court decided the San Marcos house was community property and awarded 50 percent to Ms. Gustine, 50 percent to Mr. Gustine subject to repayment of the loan from Ms. Gustine's mother.

DISCUSSION

I

Under Civil Code section 5110,[1] for the purpose of separation or dissolution, a single-family residence acquired during marriage by a husband and wife as joint tenants is presumed to be community property. This presumption may be rebutted by showing the existence of a contrary understanding or agreement. (*In re Marriage of Lucas*, 27 Cal.3d 808.)

The San Marcos house here was "acquired during the marriage" as contemplated by Civil Code section 5110. Superficially, evidence of this comes first from the documents themselves since Ms. Gustine is listed as a grantor conveying a joint tenancy interest to herself and Mr. Gustine. Before this time neither Mr. nor Ms. Gustine had a joint tenancy interest, therefore, the joint tenancy interest was "acquired" during the marriage. More convincing is language in *Lucas, supra*, explaining what triggers the presumption of section 5110: "It is the affirmative act of specifying a form of ownership. . . ." (27 Cal.3d at p. 814.) Here the affirmative act of specifying ownership occurred during the marriage. Finally, the application of Civil Code section 5110 should not depend upon whether the joint tenancy property was acquired directly by changing title in the separate property itself to joint tenancy or indirectly by using separate

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[1]Civil Code section 5110 became effective on January 1, 1970, and continued in substance Civil Code section 164. At the time Ms. Gustine acquired the San Marcos house in 1967, there was a presumption that property acquired by a married woman by an instrument in writing was her separate property and if she took with another, she was presumed to hold as a tenant in common (Civ. Code, § 164). However, in 1965, by amendment to Civil Code section 164, this separate property presumption was eliminated for purposes of separation or dissolution when the subject property was a single-family residence acquired during marriage by husband and wife as joint tenants. Then, as now, such property was presumed to be community property.

property to purchase joint tenancy property. If the Gustines in June 1970 had sold the San Marcos home, used the proceeds to purchase a second home and had that title put in joint tenancy, then the presumption of Civil Code section 5110 would hav applied. (*In re Marriage of Lucas, supra; In re Marriage of Cademartori*, 119 Cal.App.3d 970.) The same result should occur here where the Gustines directly changed the title.

The trial court found the presumption of Civil Code section 5110 was not rebutted by evidence of an agreement or understanding that Ms. Gustine was to retain a separate property interest.[2] On appeal, this court must view the evidence in the light most favorable to the trial court's determination, draw all reasonable inferences and ignore all contrary evidence. (*In re Marriage of Adkins*, 137 Cal.App.3d 68, 75.) This court must affirm if the trial court's determination is supported by substantial evidence. (*In re Marriage of Gonzales*, 116 Cal.App.3d 556, 561.)

The trial court's determination here is supported by substantial evidence. There were no written memoranda or qualifications on the deed to evidence a contrary agreement or understanding as to the nature of the property. Nothing was said to any bank officials or any third persons at the time the deed was executed or afterwards there was a separate property interest in the property or the deed was not what it purported to be. Mr. Gustine testified that the purpose of changing title was so that they would appear as a team to the world. Ms. Gustine concurred in that assessment.

Ms. Gustine testified there was an agreement before the execution of the joint tenancy deed that she would retain her separate property interest. Mr. Gustine denied such an agreement. Since the trial court held for Mr. Gustine, we must assume there was no such agreement. (*In re Marriage of Adkins, supra*, 137 Cal.App.3d 68.) Ms. Gustine said that after the deed execution, she felt the property was still hers alone, however, she, apparently, failed to communicate this to Mr. Gustine. Hidden intentions of one of the parties do not overcome the presumption

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[2]Ms. Gustine said she was practically forced into changing the title and did not do so entirely freely and voluntarily. In light of her other testimony, there is no indication of any fraud, coercion or undue influence which would render her act involuntary; nor does Ms. Gustine claim otherwise. (See *In re Marriage of Wall*, 30 Cal.App.3d 1042, 1045-1046, fn. 2.)

of Civil Code section 5110. (*In re Marriage of Frapwell*, 49 Cal.App.3d 597, 601-602; *In re Marriage of Lucas, supra*, 27 Cal.3d at p. 813.)

Mr. Gustine testified at several different points he did not believe Ms. Gustine was making a gift to him by the June 1970 deed, but he also testified he understood she was making such a gift. Even if he had consistently denied any gift intent, that alone would be insufficient to rebut the presumption. (*In re Marriage of Lucas, supra*, 27 Cal.3d at p. 815.)

The effect of affirming this judgment is to sanction a gift to the husband of $5,000 of the wife's originally separate monies plus appreciated value of the home. This gift occurs in face of a denial of intent to either make or receive a gift. This injustice occurs as a direct result of the giant step backward taken by the *Lucas* decision toward the traditional common law system where form of title ruled with iron hand. (See *What's Yours Is Mine and What's Mine is Mine: The Classification of the Home Upon Dissolution*, 28 U.C.L.A. L.Rev. 1365, 1385.) This case presents an example of the inequity that may result from adherence to technical title concepts in marital related property dealings where neither common law title rules nor sterile Spencerian logic should be welcome guests. But unfair or not, *Lucas* compels this result. (*Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455.)

Judgment affirmed.

Staniforth
STANIFORTH, J.

WE CONCUR:

Brown
BROWN, P.J.

Cologne
COLOGNE, J.

CALIFORNIA CODES

Official
California Civil Code
Classification

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CIVIL CODE

§ 5110. Community property; presumption as to property acquired by wife; limitations of actions; leasehold interests

Except as provided in Sections 5107, 5108, and 5109, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the presumption is that the same is here separate property, and if so acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is tht such property is the community property of the husband and wife. When a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of the husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of the property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and

after one year from the filing for record in the recorder's office of such conveyances, respectively.

As used in this sectin, personal proeprty does not include and real property does include leasehold interests in real property.

(Added by Stats.1969, C. 1608, p. 3339, § 8, operative Jan. 1, 1970. Amended by Stats.1970, c. 517, p. 1011, § 1; Stats.1973, c. 987, p. 1898, § 5, operative Jan. 1, 1975; Stats.1977, c. 332, p. 1287, § 3; Stats.1979, c. 373, p. 1264, § 48.)

UNITED STATES CODE

Title 28
Judiciary and Judicial Procedure

§ 2403. Intervention by United States or a State; constitutional question

(a) in any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

June 25, 1948, c. 646, 62 Stat. 971; Aug. 12, 1976, Pub.L. 94-381, § 5, 90 Stat. 1120.